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July 21, 2000

Mr. John McGuiggin, P.E.
Task Order COTR
U.S. Department of Transportation
Volpe National Transportation Systems Center
55 Broadway, Kendall Square
Cambridge, Massachusetts 02142

Subject: Libby, Montana Asbestos Emergency Response Project
Archaeological Review Process for the Screening Plant

Dear Mr. McGuiggin:

This letter summarizes the report dated July 2000 prepared by Aaberg Cultural Resource Consulting Service (ACRCS) and highlights items of particular importance to the project. Two copies of the full report are enclosed. The Volpe Center and EPA should review the entire report in order to be aware of EPA's responsibilities to comply with the regulations set forth under Section 106 of the 1906 National Historic Preservation Act (NHPA). In order to properly comply with the federal cultural resource laws known as the "Section 106 Process" (36 CFR Part 800), the following items need to be addressed by the EPA.

- Section 106 requires federal agencies, in this case the EPA, to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment on such undertakings. The goal of consultation is to identify historic properties potentially affected by the undertakings, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. Routine decisions regarding the Section 106 process will no longer be reviewed by the Council as long as there is agreement between the federal agency (EPA) responsible for compliance and the State Preservation Officer (SHPO) and Tribal Historic Preservation Officer (THPO) having jurisdiction over the location of the work. The Council may enter the Section 106 process when an undertaking: 1) has substantial impacts on important historic properties; 2) presents important questions of policy or interpretation; 3) has the potential for presenting procedural problems; or 4) presents issues of concern to Indian tribes.

We understand that EPA has accepted their role as the federal agency responsible for ensuring Section 106 compliance. Please confirm that EPA has begun the Section 106 process and has made preliminary contact with the Montana SHPO and the tribes.

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

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- The EPA has the responsibility to properly identify the appropriate SHPO and/or THPO that must be consulted. In the case of the location of Operable Unit 2 of the Libby Asbestos Project, the Montana SHPO is the appropriate Section 106 advisory body for the project. However, the NHPA requires consultation with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking (Libby Asbestos Removal Project) regardless of location. Such Indian tribe is a consulting party and consultation can be facilitated through a THPO, tribal cultural committee, tribal council, or any other groups or individuals.
- The EPA must decide early in the project how and when to involve the public in the Section 106 process. A formal plan is not required, although it may be appropriate depending upon the scale of the Libby Asbestos Project and the magnitude of its effects on 24LN1045.
- At an early stage of the Section 106 process for the Libby Asbestos Project, the EPA is required to consult with the SHPO to identify those organizations and individuals (local governments, Indian tribes, and applicants for federal assistance or permits) that will have the right to be consulting parties under the terms of the regulations.
- The EPA can combine individual steps of the Section 106 process with consent of the SHPO. Doing so must protect the opportunity of the public and consulting parties to participate fully in the Section 106 process.

"Identification" is a step in the Section 106 process which includes preliminary work, actual efforts to identify properties, and an evaluation of identified properties to determine whether they are "historic," i.e., they are listed on, or eligible for inclusion in, the National Register of Historic Places (NRHP).

The "identification" step appears to have been completed for the southern portion of the Screening Plant Site (also referred to as Operable Unit 2) and resulted in the recording of site 24LN1045 in 1975. The site was evaluated and determined eligible for inclusion in the NRHP. However, Native American consultation does not appear to have been a part of the previous investigations for 24LN1045, so the site's significance to Native Americans in the area is presently unknown and should be established during the Section 106 process.

Although previous studies have been conducted for the portion of the Screening Plant Site south of Rainy Creek, it is not certain that the identification step has been completed for the portion of the Screening Plant Site north of Rainy Creek. As the lead federal agency, the EPA would be responsible under the 1979 Archaeological Resources Protection Act (ARPA), as well as NHPA, to ensure that cultural resource considerations and investigations of the portion of the Screening Plant Site north of Rainy Creek has occurred or will occur prior to land-disturbing activities. Inquiries made by our subcontractor ACRCS have not identified previous

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investigations on the portion of the Screening Plant Site north of Rainy Creek. In accordance with our discussion yesterday, CDM Federal Programs Corporation (CDM Federal) will direct our subcontractor ACRCs to conduct an archaeological reconnaissance of the portion of the Screening Plant Site north of Rainy Creek.

- It is the EPA's responsibility to ensure that the SHPO/THPO and Indian tribes attaching religious and cultural significance to identified properties are consulted when the EPA applies the criteria of adverse effect (i.e., physical destruction or damage; alteration of a property not consistent with the Secretary of the Interior's Standards; relocation of a property; change of use or physical features of a property's setting, etc.) of the Libby Asbestos Project.
- When adverse effects are found, the consultation must continue among the EPA, SHPO and consulting parties to attempt to resolve them. Although the Montana SHPO can facilitate the consultation with respect to adverse effects, any of the consulting parties can request the Council to join the consultation if agreement among any of the consulting parties cannot be reached.

Archaeological excavation of site 24LN1045 is considered an adverse effect but is allowable as a mitigative measure as long as a well-devised mitigation and data recovery plan is developed and found acceptable by the consulting parties involved.

- The EPA is obligated to provide project documentation to all consulting parties at the beginning of consultation to resolve adverse effects. However, particular note should be made of the reference to the confidentiality provisions discussed in the NHPA.
- The EPA must provide an opportunity for members of the public to express their views on the Libby Asbestos Project. The provision embodies the principle of flexibility, relating the EPA's effort to various aspects of the Libby Asbestos Removal Project and its effects upon historic properties. The EPA must provide the public with notice such that the public has enough time and information to provide meaningful comments.
- When resolving adverse effects without the Council, the EPA must consult with the SHPO and other consulting parties to develop a Memorandum of Agreement (MOA). If this is achieved, the agreement is executed between the EPA and the SHPO and filed with required documentation with the Council. The filing is the formal conclusion of the Section 106 process and must occur before the undertaking, in this case the Libby Asbestos Removal Project, is approved. A MOA evidences an agency's (EPA) compliance with Section 106 and the agency is obligated to follow its terms.

The most likely primary consulting parties and signatories for a MOA dealing with adverse effects to 24LN1045 are the EPA, the Montana SHPO, and tribal groups of the Confederated Salish Kootenai.

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In relation to the project area north of Rainy Creek, CDM Federal recently responded to a phone call from Mr. Mark White, an archaeologist with the Kootenai National Forest, who expressed personal concern with the portion of the Screening Plant Site north of Rainy Creek. Mr. White noted that area of the project site north of Rainy Creek may have been a fur trading site and also a prehistoric site. As mentioned previously, ACRCS is determining whether this area was studied during previous investigations conducted in the area and whether cultural resource investigations will be required for Section 106 compliance.

Please note the information above provides only a summary of the required Section 106 steps that the EPA must expedite in order to proceed with soil excavations or any land disturbing activities for the Libby Asbestos Removal Project. The enclosed report provides a more detailed description of the Section 106 process in relation to the project and a cost analysis for a data recovery plan for Archaeological Site 24LN1045. We suggest that the Volpe Center and EPA read the attached report, and if in agreement with the proposed archaeological mitigation activities, contact the Montana SHPO and discuss the particulars and schedule for compliance with the Section 106 process. From our discussions with the Montana SHPO, we understand that they would like to confer directly with EPA with regard to the Libby Asbestos Removal Project. CDM Federal and its subcontractor ACRCS are prepared to provide any necessary support and assistance with this aspect of the project.

Please feel free to contact me at (617) 452-6270 with any questions on this matter.

Very truly yours,

CDM FEDERAL PROGRAMS CORPORATION


Peter J. Borowiec, Jr., P.E.
Task Manager

cc: Timothy B. Wall
Frederick G. Babin
Isabel Simoes
Steve Aaberg